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No. 85-1364

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

HERSHEL CLADY, et al.,

Petitioners,

vs.

COUNTY OF LOS ANGELES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

WALTER COCHRAN-BOND
Counsel of Record
HUNT & COCHRAN-BOND
Suite 1100
617 South Olive Street
Los Angeles, California 90014
(213) 623-9170

BILL LANN LEE
CENTER FOR LAW IN THE
PUBLIC INTEREST
10951 Pico Boulevard
Los Angeles, California 90064
(213) 470-3000
Counsel for Petitioners

Lawyer's Brief Service, Inc. / Legal Publishers / (213) 383-4457

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PETITIONERS' REPLY MEMORANDUM

Petitioners submit this reply memorandum to address the following arguments first raised in the brief in opposition filed by Respondent County of Los Angeles ("County"):

I

RESPONDENT HAS MISSTATED THE DIFFERENTIAL VALIDATION REQUIREMENT IN *ALBEMARLE PAPER CO. v. MOODY*

The County has misinterpreted both *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and the Petitioners' position with respect to the second question presented for review.

The County contends that *Albemarle* merely "requires that minorities as well as white be included in validation studies which seek to demonstrate the job relatedness of a selection device." (Respondent's Brief in Opposition, p. 11.) It then contends that it is Petitioners' position that "separate validation studies be performed for each minority group separately" to determine "whether one racial group performs better on a given test than another." (*Id.*)

To the contrary, Petitioners rely on this Court's holding in *Albemarle* that the testing program was not shown to be job related based, in part, on the requirement in the EEOC Guidelines that, where technically feasible, there be " 'separate validation of the test for the minority group in question' 29 CFR § 1607.5(b)(5)" and the recognition that "there has been no clear showing that differential validation was not feasible for lower level jobs." 422 U.S. at 435. The point is that the written test which has an adverse impact on employment opportunities for minorities must, where feasible, be shown to be job related for minorities. Here, the County *did* perform such "differential validation." Petitioners' point is that the uncontested findings in the County's own validation study show that the written test did not predict later job performance for either blacks or Hispanics.

Defendant makes reference to two findings in conjunction with this issue which have no discernible relevance. First, the finding that "the 1979 written test '. . . improves the chances of selecting qualified recruits from 9% to 48%' " (Respondent's Brief, p. 11) is not relevant because it is nothing more than a speculative projection based on the correlations found for all recruits including white recruits. (Df. Ex. 201, p. 44.) Hence, it does not negate the absence of a correlation for minority recruits. Indeed, this speculative finding is meaningless because in reality the

1979 test did not improve the chances of selecting more qualified recruits because the uncontested facts are that 89.8% of recruits graduated from the Academy from 1973 to 1978 and 88.7% in 1979 and 1980.

Second, the reference to the finding that "the 1979 Firefighter Examination substantially reduced the percentage of [Academy] terminees who were black from 69% during the quota years to 17.2%" can be misleading. This fact does not mean that the 1979 written test dramatically reduced the termination rates for black recruits. The uncontested facts are that the graduation rate for blacks during these two periods were almost identical: 74.8% from 1973 to 1978; and 77.8% for 1979 and 1980. (Df. Ex. 200, p. 78; Df. Ex. 201, p. 35.) The figures relied upon by the County result solely from the fact that from 1973 to 1978, a greater percentage of recruits were black and that during both periods, blacks were disproportionately terminated from the Academy. The change in the County's use of the written test simply had no impact on black recruits - a result which would be expected where the test was found not to correlate with later performance.

II

PETITIONERS HAVE RAISED ONLY A SINGLE LESS DISCRIMINATORY ALTERNATIVE IN THE PETITION

Contrary to the County's assertion, Petitioners have not chosen to base its less discriminatory alternative argument in this Court on the alternative of a "banding" approach to ranking candidates. Rather, Petitioners rely solely on the alternative of using the written test with a low passing score in contrast to the 1979 use of the written test to exclude a

greater percentage of all applicant and to rank those applicants who passes the test. As the County recognized in its brief, in 1972 the written test "resulted in a ninety-seven percent passing rate having no significant impact on minority hopefuls." (Respondent's Brief, p. 4; *see also* Petition for Writ of Certiorari, p. 8.) However, in 1979 the passing rates on the written test were much lower: 75.7% for whites; 33.9% for blacks; and 55.6% for Hispanics. (Appendix, p. A-15.) It is this successful alternative method of use of the written test that Petitioners present as the less discriminatory alternative to the County's 1979 practice.

III

THE BOTTOM LINE DEFENSE WAS NOT AN ISSUE IN THIS LITIGATION

Respondent suggests that the writ should be granted in order to reconsider this Court's recent decision in *Connecticut v. Teal*, 457 U.S. 440 (1982). Petitioners submit that the reconsideration of such a recent precedent would be highly unusual. Moreover, in the instant case, the "bottom line" disparate impact issue is not properly presented for review.

There are two reasons the bottom line issue is not properly presented in this case. First, the issue was specifically eliminated as an issue to be litigated when the parties submitted an Amended Pre-Trial Conference Order on July 20, 1982. The original Pre-Trial Conference Order, filed June 21, 1982, had included the bottom line defense as an issue to be tried, but the parties stipulated to eliminating the issue upon learning of this Court opinion in *Teal*. The Local Rules for the United States District Court, Central District of California provide at Rule 9.8.3 that:

> "*Binding Effect.* The Pre-Trial Conference Order when signed by the Court shall control the subsequent course of this action, unless modified at the trial to prevent manifest injustice (Federal Rule Civil Procedure 16)."

See also Rule 16(e),Federal Rule Civil Procedure.

The fact that there are findings relating to the bottom line defense in the Findings of Fact and Conclusions of Law ("Findings") only reflects the liberties taken by counsel for the County in drafting the Findings and the inadequate scrutiny given to these Findings by the District Court. Relying on the Amended Pre-Trial Conference Order, Petitioners did not even raise the bottom line issue in the Court of Appeals. The Court of Appeals misinterpreted the failure to raise the issue on appeal as a concession that there was no bottom line adverse impact. (Appendix, p. A-14.) Petitioners' actions, however, were not a concession but rather a recognition that the bottom line findings were nothing more than facts not relevant to the issues on appeal. Had the bottom line issue remained in the Amended Pre-Trial Conference Order, Petitioners would have addressed the issue on appeal.

The second reason the bottom line defense is not properly presented in this case is that the uncontested facts evidence a severe bottom line disparate impact for minorities. Minorities constituted a full 34% of those who took the written test, the first step in the selection process. In contrast, only 18% of the persons hired were minorities. Hence, the overall selection process caused the employment opportunities for minorities to be cut almost in half.

Petitioners submit, therefore, that the bottom line defense is simply not at issue in this case.

CONCLUSION

For the reasons stated in the Petition and in this Reply Memorandum, it is respectfully submitted that a writ of certiorari should issue as to the questions raised in the Petition but that the writ should indicate that the bottom line issue raised by the Respondent is not subject to review.

DATED: March 14, 1986

Respectfully submitted,

WALTER COCHRAN-BOND
Counsel of Record
HUNT & COCHRAN-BOND
Suite 1100
617 South Olive Street
Los Angeles, California 90014

BILL LANN LEE
CENTER FOR LAW IN THE PUBLIC INTEREST
10951 Pico Boulevard
Los Angeles, California 90064
Counsel for Petitioners